Metro Cars, Inc. *and* Local 299, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 7–RC–19847

November 16, 1992

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Acting Regional Director's Decision and Direction of Election (pertinent portions attached).[1] The request for review is denied as it raises no substantial issues warranting review.

[1] The only issues on which the Employer seeks review are whether the Acting Regional Director erred in finding that the sedan drivers are employees of the Employer rather than independent contractors, ruling that the drivers of sedans owned by someone other than the Employer shall vote subject to challenge in the election, issuing his decision without the parties filing their posthearing briefs, and finding sufficient evidence of a showing of interest by the Petitioner.

APPENDIX

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Employer, a Michigan corporation located at 28900 Goddard Road, Romulus, Michigan, provides luxury sedan transportation to passengers traveling to and from Detroit Metropolitan Airport. The Employer was given authorization to operate a sedan service at the airport by Wayne County, Michigan (the County), owner of the airport., through a concession agreement signed by the county and the Employer. The concession agreement is effective January 1, 1991 through December 31, 1995.

The Petitioner seeks an election among all regularly scheduled full-time chauffeur drivers; excluding all professional employees, clerical employees and guards and supervisors as defined in the Act. Petitioner contends that there are approximately 51 full-time drivers in the proposed unit.

The Employer contends that the drivers are independent contractors and, on that basis, the petition must be dismissed. In support, the Employer claims that the drivers' terms and conditions of employment are dictated by the concession agreement with the County, and are not determined by the Employer. In the event the Board finds that the drivers are employees within the meaning of the Act, the Employer would also include in any unit found appropriate all regular part-time drivers.

The concession agreement requires that the Employer have a minimum of 30 cars in its fleet and that it service the traveling public 24 hours a day. The concession agreement also requires that the sedans be American-made full-sized luxury sedans, all of the same make, model and color, and must not be more than three model years old. Three pages of the agreement relate to the vehicle's interior and exterior appearance. The agreement states that fares will be set on a zone basis and will be ''at least 15% more than the taxicab rates approved by the County to the same locations.'' The risk of non-payment shall be borne solely by the Employer. The agreement also gives the County the right to inspect the vehicles and to direct the Employer to remove a car from service in the event it does not conform with the cleanliness and maintenance standards set forth in the agreement. As to uniforms, the agreement requires that the employees wear uniforms identifying such as the Employer's employees. The concession agreement is not distributed to the drivers.

The Employer requires every driver to sign a sales agency agreement which sets forth the commission structure, sales policies, dispatching arrangement, accounting policies, and required periods of availability for service. The Employer also distributes to new drivers the ''rules of operation.'' These rules are incorporated into the sales agency agreement by reference and essentially reflect the requirements set forth in the concession agreement, although with more specificity as to uniforms, zone rates, method of payment, and general operating procedures. For instance, the rules of operation require that the drivers wear Employer-issued uniforms consisting of a navy blue blazer, grey slacks, a white button-down shirt with a company tie, and name identification. Each driver pays a $500 security deposit to the Employer for his or her uniform. The rules of operation are distributed to all drivers at the time they are hired.

Cullan Meathe is the Employer's president and chief executive officer. His duties include the acquisition of vehicles, government affairs, and overseeing the operations of the company. Meathe testified that in order to maintain ''shift integrity,'' drivers are assigned to work particular shifts. When a driver can not cover his or her shift, a ''walk-on'' driver normally fills in. Walk-on drivers do not maintain regular shifts, but come to the Employer's dispatch office in the morning to drive vehicles whose scheduled drivers are unavailable. Walk-on drivers are subject to the Employer's rules of operation, disciplinary. System, and dispatch policies. They are also required to sign the sales agency agreements. There are approximately 25–35 walk-on drivers.

The Employer operates two 12-hour shifts. The drivers generally are permitted to choose their shifts at the time they are hired, but must maintain that choice for the duration of their employment or until the Employer authorizes a shift change. Drivers with high seniority and proven sales performance are given first choice among available shifts. Each driver is required to work every other weekend. Drivers who wish to take vacations must give the Employer two weeks prior notice. Vice president of sales and operations Edward Till, director of fleet Michael McNeely, and dispatch administrator Carolyn Collins are responsible for making sure that the drivers adhere to their shift assignments.

During busy periods, the Employer posts mandatory work schedules for drivers who were not otherwise scheduled. Driver Joe Hardy testified that when he went to the Employer's premises to pick up his last check the week before the Grand Prix race, he saw a ''mandatory'' work schedule posted in the lobby. This schedule was posted in anticipation of the increased demand for driver services from people arriving in Detroit for the race.

The Employer maintains a central reservation office which customers call to place a request for a ride. The dispatcher communicates the request to an available driver via a two-way radio system installed in each sedan. Drivers who solicit customers at the airport without a dispatch must report all trips/services to the dispatcher. The drivers are not permitted to maintain exclusive customer accounts which they alone service.

The sedans park in designated areas at the airport while waiting for passengers, and are required to rotate through the North, South and International terminals until they obtain a fare. The drivers provide the customer with a trip from the airport to any destination. The driver determines the route from the airport to the customer's destination and charges the customer for any incidental expenses such as parking or bridge tolls. If the driver solicits a return trip to the airport for the following day, this request is communicated to the dispatcher who then assigns the trip to a driver. If a customer requests a particular driver, that request is honored unless the driver is unavailable, in which case the dispatcher assigns it to the driver who has been waiting the longest time at the terminals.

The Employer also offers ''executive as directed service'' which consists of picking up a passenger at the airport and transporting that passenger to several different locations over a period of time. This service is offered to customers as an alternative to renting a car at the airport. The employer determines and pays for all advertising related to its sedan services.

The fares for the luxury sedans are set forth in the rules of operation, Article VI. The rates range from $15 for Zone A, municipalities nearer the airport such as Inkster, Wayne, Romulus, and Baylor, to $70 for Zone J (Highland, Clarkston, Lake Orion, New Haven, New Baltimore, which are more distant). Meathe testified that the drivers may not raise their rates unilateral under any circumstances.

The driver is responsible for collecting all fares, cash and credit, and is liable for non-payment. The drivers fill out transportation vouchers provided by the Employer for each service performed. The driver is also responsible for properly documenting ''house account'' purchases, i.e., passengers who ask to be billed directly. All transportation vouchers and credit card receipts are submit.ted to the dispatcher at the end of the driver's shift.

The driver is responsible for all maintenance on the vehicle, including maintaining fuel, oil, windshield fluid, and power steering fluid levels and interior and exterior cleaning. The record does not indicate whether the driver or Employer bears the costs of major repairs. The drivers are required to pay a $50 security deposit to the Employer for the use of the vehicle. The Employer, in turn, leases the vehicles from Metro Cars Management Corporation.[3]

The Employer reports the drivers' commission payments to the Internal Revenue Service on 1099 forms and does not withhold taxes or workers' compensation premiums. The Employer provides insurance for all of its vehicles, although drivers who need additional coverage due to a poor driving record must pay the additional expense. The Employer pays all license fees and taxes on the vehicles.

The drivers must have a luxury sedan permit to operate at the airport. These permits are issued by the County and are provided to the drivers through the Employer. For a fee of $25, the Employer provides a training course for all drivers which they are required to attend and pass. In its rules of operation, the Employer reserves the right to perform random drug tests on the drivers. Each driver is tested approximately once a year and, if the test result is positive, the driver is terminated.

The Employer's disciplinary policy allows for two warnings, and on the third incident, the violator is terminated. President Meathe testified that the policy of ''three strikes you are out'' has been enforced. In April 1992, Meathe observed a driver operating a Metro Car vehicle in areas that he did not belong. The dispatcher directed the driver to bring the car in immediately. The next day he was digcharged assertedly for misappropriating a car, a violation of the rules of operation.

Driver Joe Hardy testified that he was required to maintain particular shifts and could not refuse to pick up a fare during working hours. Drivers who do not work their scheduled shifts, refuse to pick up fares, or refuse to stand outside their cars to solicit business, are subject to discipline. According to Hardy, discipline normally consists of being called off the road and questioned by Meathe.

Hardy was terminated in May 1992 assertedly for ''misappropriation of funds.'' On three occasions prior to his termination, the Employer informed Hardy that it had found he was short of funds in the vouchers he submitted to the dispatcher. For each shortage, the Employer deducted the amount from Mardy's commission check.

Felicia McKinney was employed by the Employer as a driver from March 1991 through October 30, 1991. On September 5, 1991, she was suspended for leaving work early and was required to meet with the owners before she could return to work. She also received four disciplinary slips from her immediate supervisor, Pat Clancy, three of which were for leaving work before her shift ended. One slip recites, ''removed from schedule, may drive on walk on basis.'' She also received discipline for arguing with a dispatcher and wearing an unkempt uniform. On November 9, 1991, McKinney received a certified letter dated November 6, 1991, from Pat Clancy, which stated that she was terminated as of October 30.

Prior to July 14, 1992, the Employer required that the drivers sign sales agency agreements upon their hire. These agreements established the following commission structure: new drivers receive 35 percent commission on gross sales, the Employer receives 65 percent; after 120 days of employment, the driver receives 40 percent and the Employer receives 60 percent. The drivers earn a 25 percent commission on cellular telephone charges and retain all gratuities. The drivers are paid by the Employer on a weekly basis.

According to the Employer's witness, on July 14, a date four days after the close of the hearing, the sales agency agreements in effect were to be cancelled and the drivers required to enter into new agreements with a different commission structure. This change was announced at a mandatory sales agency meeting on May 8, 1992, and explained in a newsletter which the drivers received with their checks on

[3] Metro Cars Management Corporation is a separate Michigan corporation which is owned by the same principals which own Metro Cars, Inc. The two companies share corporate offices. No parts has asserted that the Management Corporation is a joint or single employer of the employees at issue.

May 14, 1992. Under the new agreement, the drivers would receive 45 percent of gross sales and the Employer would receive 55 percent. Further, rather than one sales agency agreement, the new arrangement requires that the driver enter into two agreements: a rental/lease agreement between the driver and Metro Cars Management Corporation, and a management agreement between the driver and Metro Cars, Inc. The new agreements would be offered to every driver currently driving for the Employer.

The rental/lease agreement gives the driver the right to lease a vehicle from Metro Cars Management Corporation for a four-week period, automatically renewable for an additional four weeks under the same terms and conditions.

The management agreement contains essentially the same terms as the sales agency agreement scheduled to expire on July 14. The driver must observe the Employer's rules of operation and work exclusively for Metro Cars, Inc. Pursuant to this new agreement, however, each vehicle must be on the road 18 hours a day. To fulfill this obligation, the driver had the right to hire one or two additional drivers to operate the vehicle in his or her absence. All commission checks issued by the Employer will go directly to the lessee-drivers, who in turn will compensate any other drivers operating the vehicle. As before, all drivers must observe the Employer's rules of operation.

At sometime between the hearing and July 14, the Employer asserted, that all drivers will be asked to sign the new agreements. As of the hearing date, no sales or lease agreements had been distributed or otherwise made available to the drivers for their acceptance. In summarizing the changes that will take place on July 14, the Employer's counsel stated that he did not believe ''that it is anything substantial other than it is changing some of the structure of the allocation of the commissions.'' Indeed, president Meathe testified that the only change would be the commission percentage.

DISCUSSION

Section 2(3) of the Act excludes from the definition of employee ''any individual having the status of an independent contractor.'' In *NLRB v. United Insurance Co.*, 390 U.S. 25, 256 (1968), the Supreme Court concluded that Independent contractor status is to be determined by evaluating ''the total factual context . . . in light of the pertinent common law agency principles.'' The Board has adopted the common law right of control test to determine whether individuals are independent contractors or employees. This test has been explained as follows:

> Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one on employment; while on the other hand, where control is reserved only as to the result sought, the relationship is that of independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative. *News Syndicate Co.*, 164 NLRB 422, 423–424 (1967).

Among the factors considered significant under the ''right to control'' test are (1) whether individuals perform functions that are an essential part of the company's normal operation or operate an independent business; (2) whether they have a permanent working relationship with the company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the company's name with assistance and guidance from company personnel; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; (5) whether they account to the company for the funds they collect under a regular reporting procedure prescribed by the company; (6) whether particular skills are required for the operation subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessperson which may result in a profit or loss. *Standard Oil Co.*, 230 NLRB 967, 968 (1977); *NLRB v. Pepsi Cola Bottling Co.*, 455 F.2d 1134, 1141 (6th Cir. 1972).

Other relevant factors are (a) the nature of the parties' understanding; (b) indicia of entrepreneurial activity and risk; (c) the method of compensation and tax withholding; and (d) the extent of supervision imposed by government or accrediting agencies. *North American Van Lines v. NLRB*, 869 F.2d 596, 599 (1989); *Cardinal McCloskey Children's & Family Services*., 298 NLRB 434 (1990); *Pierre's Vending Co*., 274 NLRB 1219 (1985): *Capital Parcel Delivery Co.*, 256 NLRB 302 (1981).

With regard to supervision imposed by government authorities, the Board, in *Cardinal McCIoskey*, supra at fn. 8, stated:

> Government regulations constitute supervision not by the employer but by the state. Thus, to the extent that the government regulation of a particular occupation is more extensive, the control by a putative employer becomes less extensive because the employer cannot evade the law either, and in requiring compliance with the law he is not controlling the [individual]. Citing *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978); *Don Bass Trucking*, 275 NLRB 1172, 1174 (1985).

In *NLRB v. O'Hare-Midway Limousine Service*, 136 LRRM 2505 (1991), the Seventh Circuit affirmed the Board's determination that an airport-limousine driver was not an independent contractor but an employee of the limousine service.

O'Hare-Midway is factually similar to the instant matter and appears to be the controlling case in the area of airport limousine drivers. In *O'Hare-Midway*, the drivers were permitted to select the a.m., p.m. or all-day shift, but a driver could not change his or her work schedule, or terminate a shift early, without the employer's permission. The drivers could retain only 40 percent of their gross fares and were required to turn in the remaining 40 percent to the employer. The drivers were required to adhere to company rules regarding the manner in which they collect fares and service passengers, including maintaining records of each fare received. The employer had the right to fine or reprimand the drivers for failure to comply with company procedures and the employer retained the discretion to refuse to, provide a driver with a vehicle. The Court also relied on the fact that the employer required the drivers to follow a mandatory dress code.

In concluding that the drivers were employees and not independent contractors, the Court stated, ''Although drivers

buy their own gasoline and absorb the losses for delinquent passengers, and although the Company provides no benefits to its drivers, makes no deductions for social security and does not withhold state and local income taxes, on balance, the evidence was substantial that [the driver] was not an independent contractor.'' 136 LRRM at 2506.

As in *O'Hare-Midway*, the drivers here are allowed to choose their shifts at the time they are hired, but may not deviate from that schedule without the Employer's permission. When shifts are available, the Employer considers seniority and sales performance in determining which employees have priority in selecting those shifts. The Employer requires all drivers to work two weekends a month and to give the Employer two weeks notice in requesting vacation time.

As in *O'Hare-Midway*, the Employer is dependent on the drivers' sales activity for its profit. The Employer requires the drivers to submit all fares to the Employer's dispatch office at the end of their shift. The Employer then keeps 55 percent of the gross sales before returning the remainder to the driver. Thus, based on the split commission structure, the Employer has a direct financial stake in the amount of fares collected by the drivers

The drivers must also account for their earnings by recording every service rendered and the fare received for such service on a transportation voucher provided by the Employer. Failure to turn in all transportation vouchers and credit card documents may result in discipline.

The drivers must wear Employer-issued uniforms for which they must pay a security deposit. Their uniforms include badges which identify the driver as a Metro Cars Inc. employee. If the drivers do not adhere to the uniform policy, they may be subject to discipline.

The Employer's disciplinary system includes three steps: written warning, suspension, and termination. The record shows that drivers have been pulled off the road, warned, suspended and terminated for infractions of the Employer's rules of operation. Indeed, Employer President Meathe testified that the ''three strikes you are out'' policy has been enforced.

I reject the Employer's argument that the concession agreement dictates the drivers' terms and conditions of employment. While the concession agreement sets forth certain minimal standards that the Employer must maintain in order to do business at the airport, it does not carry the same force or effect. of a government law or regulation. By choosing to enter the concession agreement, the Employer made the decision to do business and employ persons subject to certain minimal standards set by the county. This agreement does not affect the fact that the drivers work exclusively for the Employer, get paid by the Employer, and their working conditions are controlled by the Employer.

It is clear that the Employer exercises substantial control over the daily activities of the drivers. They are hired, supervised, paid a commission, and work hours assigned by the Employer. The Employer further influences the drivers working conditions by requiring uniforms and detailed accounting procedures, enforcing an established disciplinary system, and maintaining rules of operation and a drug testing policy. Based on all of the above, I find that the drivers are employees of the Employer and not independent contractors.

The Employer also contended at the hearing that the walk-on drivers should be included in any unit found appropriate. The Employer has approximately 25–35 walk-on drivers on its payroll. Walk-on drivers will in for regularly scheduled drivers who cannot make their shift. While they do not maintain regular shifts, the record indicates that they regularly show up at. the Employer's dispatch office in the morning and drive any available Metro Car vehicles. Meathe testified that walk-on drivers can work their way up to a full-time driver if shifts become available. Walk-in drivers are subject to the Employer's rules of operation, disciplinary system, and dispatch policies. They are are required to sign the same sales agency agreements that the full-time drivers sign. Under these circumstances, I find that the walk-on drivers share a sufficient community of interest with the full-time drivers and should be included in the unit. as regular part-time employees. However, the record does not delineate the work frequency of the on-call drivers other than as set forth above. As I cannot determine from the record who among the on-call drivers would qualify as regular part-time employees, I find it appropriate to apply an eligibility formula utilized by the Board in such circumstances. Accordingly, eligible to vote as regular part-time employees will be only those on-call drivers who averaged four hours or more on work per week in the calendar quarter immediately preceding the date of this Decision. *Tri-State Transportation Co*., 289 NLRB 356, 357 (1988); *V.I.P. Movers, Inc*., 232 NLRB 14, 15 (l977). Those individuals who do not satisfy this formula will be ineligible to vote as set forth as irregular or casual employees.

With regard to the alteration in contractual arrangements that assertedly was slated to occur subsequent to the close of the hearing, no determination can be made as this time whether the announced procedures will cause, or have caused, any substantial changes in the composition of the unit found appropriate below, or in the voting eligibility status of any individuals. While the Employer asserted that the changes are not substantial and that the essential differences from prior practices are only with the drivers' commission payment arrangements, it appears that the drivers may work longer hours daily or arrange for others to drive their leased vehicles. However, it is noted that all drivers would be subject to the same working conditions.

In an arrangement assertedly existing up to the time of the hearing, driver Ben Hayes, according to the record, owns two luxury sedans which he was described as operating under the Employer's management to which he paid management fees. Hayes apparently utilized three individuals, Keith Anthony, Rodney Harrington and Walter Welch, to drive his two sedans. The three were subject to the same Employer rules of conduct and performance required of drivers employed directly by Metro Cars. The parties, on the record, agreed that Anthony, Harrington, and Welch should be excluded from the unit. However, in the circumstances of this case, including that the Employer itself appears to be urging unit drivers to make similar arrangements after July 14, 1992, I shall not accept the agreement to exclude the three Hayes drivers, but instead I shall permit them to vote subject to challenge if they appear at the polls.

5. Based on the record evidence as a whole, the following employees of the Employer constitute a unit appropriate for

the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

All full-time and regular part-time chauffeur drivers employed by the Employer at its facility located at 28900 Goddard Road, Romulus, Michigan; but excluding all professional employees, clerical employees, guards and supervisors as defined in the Act.

[4] As the exact number of eligible on-call drivers cannot be determined, I am satisfied, administratively, that the Petitioner has submitted sufficient evidence of interest to proceed to the election directed. However, as the unit found appropriate is broader in scope than the one sought by the Petitioner, I shall accord it 10 days from the date of this decision to advise me whether it wishes to proceed to an election. Should Petitioner choose not to proceed, it may request to withdraw its petition, without prejudice against refiling.